

SCOTUS Aids Trump's Drive to Autocracy

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Throughout the world, autocrats have gained power to destroy democracies by obtaining control over the executive branch of government. In Turkey, Hungary, and Poland, for example, autocrats have secured constitutional amendments (or comparable legislation) through Acts of Parliament or referenda [ending the independence of key bureaucracies](#), in part by giving the head of state authority to dismiss officials. They then drive out neutral experts and start using government authority to protect their corrupt supporters and persecute their enemies.

The United States Supreme Court just took a big step in that authoritarian direction in [Seila Law LLC v. Consumer Financial Protection Bureau](#), in a 5-4 decision. In that case, the Supreme Court created a constitutional rule that the President has the right to fire high executive branch officials for political reasons. It invalidated a law only authorizing presidential removal of the independent Consumer Financial Protection Bureau for good cause. Thus, the Supreme Court instituted a constitutional change through judicial fiat like those that the world's autocrats have accomplished through more democratic means.

This ruling will likely legitimize President Trump's ongoing abuses of removal authority, certainly in the eyes of Trump and likely in the eyes of at least his dwindling band of supporters. President Trump has let go of Federal Bureau of Investigation Director James Comey, Attorney General Jeffrey Sessions, Homeland Security Secretary Kirstjen Nielsen, US Attorney for the Southern District of New York Geoffrey Berman, and a parade of inspectors general. These and many other cases apparently involve punishing officials for obeying legal duties ([such as to convey the whistleblower complaint to Congress that led to Trump's impeachment](#)), uncovering government corruption, or investigating the President's associates. Collectively, every federal government employee now knows that obeying the law on matters important to Trump is a firing offense.

Trump has already succeeded in forcing the Department of Justice (DOJ) to protect his friends, having [secured DOJ requests to dismiss charges](#) that Michael Flynn pled guilty to and to [downgrade Roger Stone's sentence](#), over the objections of career prosecutors. *Seila Law* will make it harder for government prosecutors to resist Trump's repeated calls to emulate Viktor Orbán by [investigating Trump's political opponents](#). The U.S. Constitution requires all government officials to swear allegiance to the Constitution, not the President. But it will take courage to comply with one's oath when doing so leads to Supreme Court sanctioned dismissal.

Yet, the *Seila* Court endorsed the principle that high ranking officials should fear the President in its decision. And it linked the "structural principle" of presidential control through fear to the protection of liberty. The conservative majority apparently

sees the threat to liberty protected by the separation of powers as emanating from bureaucrats who cannot be fired for disagreeing with the President's policy judgments. Nobody on the Court even mentioned the repeated demonstration of the central role autocratic heads of state have played in ending democracy and sharply curtailing liberty around the world, let alone the ongoing destruction of the rule of law in the United States under Trump. Indeed, the majority never mentioned the fear of executive power that motivated the American Declaration of Independence and many of the Constitution's ratifiers and framers.

Seila Law, however, carves out two exceptions to its newly invented rule that the President has a constitutional right to fire officials for political reasons. First, the *Seila* Court carves out an exception for "inferior" federal officers, thus perhaps allowing civil service protection to remain intact. Second, it allows independent agencies governed by commission and performing adjudicative or legislative functions (as opposed to executive functions) to retain for-cause removal protection.

While these exceptions seem to make the Court's reformation of constitutional law less sweeping than those carried out by the new autocrats, they may prove fragile. First, the Court's general approach to the Constitution leaves these "exceptions" vulnerable and their use in new legislation suspect. The Court exercised an extreme form of judicial supremacy that gives no weight to political bargains in legislation and largely outlawed new legislative innovation. And the Court's theory that the President must himself exercise all executive power seems at odds with the exceptions. Second, the Court's opinion suggests a willingness to shrink the categories of eligible independent agencies and inferior officers.

Notwithstanding *Seila Law*'s exceptions, President Trump has carried out autocratic civil service reform through informal measures, triggering mass resignations of "inferior officers" through undermining of governing statutes, bans on rational discussion (of climate disruption for example), a government shutdown, pay freezes, and reassignments. Thus, Trump has informally accomplished much of what the new autocrats have done through legislation removing civil service protections.

The American media authority (the FCC) and electoral commission (FEC) may fit within the *Seila Law* exemptions. That's a good thing, because the new autocrats use these sorts of bodies to capture the media and tilt elections. But the FEC has become irrelevant anyway, because of partisan paralysis and substantial state and local roles in running all American elections. And Trump and his Republican Party are working hard to undermine the fairness of American elections, for example, by [fighting funding for mail-in balloting](#) needed to secure elections during a pandemic.

In the near term, *Seila Law* may hinder congressional efforts to combat the coronavirus and its economic effects. Trump already [fired inspectors general](#) charged with monitoring the massive expenditures under recent legislation and some money has been wasted. The logical step to protect future outlays against corruption would involve protecting an inspector general from removal. Republicans can now hide behind *Seila Law* to avoid accountability mechanisms, even though *Seila Law* permits these protections if inspectors general are inferior officers.

In the long term, the Court has planted a time bomb in the Constitution. It may prevent Congress from adopting safeguards many countries have adopted to protect themselves from autocracy, such as [ensuring prosecutorial independence through removal protection](#).

In *Seila Law*, the Supreme Court used an activist approach to create an important new rule amplifying already dangerous presidential power. In doing so, nobody on the Court, not even the dissenters, displayed any awareness of the lessons one might glean from countries that have seen their democracies seriously undermined through abuse of executive power in recent years. That's a shame, and quite dangerous.

